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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi (App. 106) is reported at 330 So.2d 268. The opinion of the Chancery Court of Hinds County, Mississippi (App. 99) is not reported.

JURISDICTION

This action was commenced in the Chancery Court of Hinds County, Mississippi, pursuant to Section 10121.1, Mississippi Code of 1942 (now codified as Section 27-65-47, Mississippi Code of 1972, Annotated, Volume 9, page 52) seeking a refund of privilege taxes assessed against appellant Complete Auto Transit, Inc. The decree of the

Chancery Court upholding the assessment was entered on August 6, 1974 (App. 102).

Upon timely appeal, the order of the Chancery Court was affirmed by the Supreme Court of the State of Mississippi, which held that the privilege tax statute was constitutionally valid as applied to Complete Auto Transit, Inc. The opinion and judgment (App. 112) of the Mississippi Supreme Court were filed on April 13, 1976.

The Notice of Appeal to this Court (App. 113) was filed in the Mississippi Supreme Court on June 9, 1976. This appeal was docketed on July 12, 1976. Probable jurisdiction was noted on October 4, 1976. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal is predicated upon the Interstate Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), which provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The following statutes were in effect at all times relevant to this litigation and formed the basis for the assessment of the tax at issue.

Section 10105 of Mississippi Code of 1942 (now codified as Section 27-65-13, Mississippi Code of 1972, Annotated, Vol. 9, page 12), which reads as follows:

> There is hereby levied and assessed, and shall be collected, *privilege* taxes for the *privilege* of engaging or continuing in business or doing business within this

> state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections. (Emphasis added.)

and Section 10109 (2), Mississippi Code of 1942 (codified as Section 27-65-19 (2), Mississippi Code of 1972, Annotated, Vol. 9, page 20), which provided[1] in part as follows:

> Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent (5%) of the gross income of such business. . . .[2]

QUESTION PRESENTED

The following question is presented by this appeal:

Whether the State of Mississippi may constitutionally impose a tax on the Appellant solely for the privilege of engaging in exclusively interstate commerce.

STATEMENT OF THE CASE

This case involves an assessment for privilege taxes imposed upon Appellant Complete Auto Transit, Inc. (Complete Auto), a Michigan corporation. Pursuant to authority

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1. The statute was amended effective as of August 1, 1972, so as to exclude the transportation of property. Mississippi Laws 1972, Chapter 506. The statute as amended appears in Mississippi Code of 1972, Annotated, Supp. to Vol. 9, pages 14-15.

2. The full text of the statute is set out in Appendix A to this Brief.

granted by the Interstate Commerce Commission, Complete Auto operates in every state in the United States, with the exception of Alaska and Hawaii. Complete Auto is engaged in the business of transporting motor vehicles (cars and trucks) by motor carrier for General Motors Corporation (General Motors). All of the vehicles involved in this case were shipped by General Motors from various assembly points located outside the State of Mississippi to designated General Motors dealers in the State of Mississippi. The vehicles were shipped to the dealers in Mississippi via rail to Jackson, Mississippi, and via truck for the final leg of the journey. The interchange between the rail carrier and Complete Auto took place at a railhead ramp in Jackson, Mississippi.

The State Tax Commission, acting under the aforementioned Sections 10105 and 10109 (2), assessed a privilege tax on Complete Auto, measured by the gross revenues earned by Complete Auto for transporting the vehicles from the railhead in Jackson, Mississippi, to the various General Motors dealers located in Mississippi. (No tax was assessed on any portion of the gross income received by Complete Auto for transporting vehicles from the Jackson, Mississippi railhead to dealers located outside the State of Mississippi.) The assessment was predicated on the State Tax Commission's position that the transportation of the vehicles from Jackson to the dealers in Mississippi constituted intrastate commerce. The assessment was in the amount of $167,375.30, for the period August 1, 1968 through July 31, 1972. It is undisputed that the tax levied constituted a tax on the *privilege* of conducting the business.

Upon the trial of the case, the following undisputed facts were established.

Pursuant to its agreements with various General Motors dealers located within the State of Mississippi and elsewhere, General Motors was obligated to manufacture motor vehicles as specifically ordered by each of the dealers and to deliver these vehicles to the dealer at the dealer's location (App. 47). All of the motor vehicles were manufactured at plants located outside of the State of Mississippi (App. 48).

When an order for a particular vehicle was received by General Motors from a dealer, the vehicle was assembled. General Motors then made the decision as to which carrier or carriers would be used to transport the vehicle to the dealer. Since the contract required General Motors to deliver the automobiles at each dealer's location (showroom), it was necessary that the delivering carrier be a motor carrier rather than a rail carrier; in fact, many of the vehicles were transported the entire distance by a motor carrier. However, when greater distances from the assembly point to the delivery points were involved, it was more economical to utilize rail transportation where possible (App. 49). Accordingly, General Motors often used rail carriers for a portion of the journey, and motor carriers, either common or contract, for the last portion of the journey (App. 49-50).

General Motors made all transportation arrangements before the vehicle was shipped from the assembly plant; prior to shipment each vehicle was labelled and identified with respect to the particular dealer to whom the vehicle was to be delivered (App. 52-56). Indeed, General Motors billed the dealer for the automobile when the vehicle was delivered to the railroad (App. 62). Once a vehicle was delivered to the carrier, General Motors had absolutely nothing further to do with the vehicle. The vehicle was in the care, custody, and control of the carriers from that point until the vehicle was delivered to the dealer. Transportation charges for transportation to the dealer's location

were paid by General Motors, and General Motors was reimbursed by the dealer for this cost (App. 62-63).

At the time of the original delivery of the vehicle by General Motors to the rail carrier for transportation to the dealers, a waybill was prepared showing that the entire shipment of vehicles that was to be loaded on the rail car was to be delivered to Complete Auto at Jackson for a continuation of the transportation of each vehicle to the designated dealers. In addition, the exact name and address of the dealer to which each vehicle was to be delivered was placed on or in each vehicle. At the same time General Motors forwarded information to Complete Auto giving Complete Auto a detailed description of each vehicle that was being shipped, the rail car on which it was loaded, the date that it was shipped, and the name and location of the dealer to which the vehicle was to be transported by Complete Auto. This information was received by Complete Auto at its Jackson office prior to the time that the rail car on which the vehicle was being transported would arrive. Thus, in advance of the time that the vehicles actually arrived in Jackson, Complete Auto would know what vehicles were en route, approximately when to expect the vehicles to arrive in Jackson, and the dealer to whom it was to deliver such vehicles. Upon receipt of the information, Complete Auto would make its plans to continue the transportation of each such vehicle to the respective dealers. Accordingly, Complete Auto was able to do most of its paperwork before the motor vehicles actually arrived in Jackson (App. 79-81).

Thus, it is clear from the record that the ultimate destination of each vehicle was clearly identified at the time that it was delivered to the railroad.

After the rail carrier portion of the journey was completed, the rail carrier transferred the vehicles directly to

the motor carrier in Jackson, Mississippi (App. 41). No representative of General Motors was present at the interchange from the rail carrier to the motor carrier (App. 83).

The mechanics for working out the interchange of the vehicles at Jackson were that Complete Auto rented a small parcel of land, together with a small office located thereon, from the railroad (App. 78-79). When the vehicles arrived in Jackson on rail cars, they were unloaded by the railroad and placed on railroad property. As soon as practicable, usually within twenty-four to forty-eight hours, a representative of Complete Auto, together with a representative of the railroad, would inspect each vehicle to see if it had sustained any damage during the rail portion of the journey. If the vehicle was not damaged, it was turned over by the railroad representative to Complete Auto for the continuation of the transportation to the dealer (App. 71-72).[3] If the vehicle had been damaged, this was noted on a document (Exhibit C-4, App. 84, 85) signed by a representative of the rail carrier and a representative of Complete Auto, and the vehicle was then transferred to Complete Auto for completion of the journey to the dealer (App. 83-86). During the period of time involved in this case, an average of approximately 300 vehicles per day were transferred by the rail carrier to Complete Auto at the Jackson interchange point (App. 60).

Complete Auto began transporting motor vehicles from the Jackson, Mississippi ramp in early 1960. The State

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3. We note here for the sake of accuracy one minor error in the opinion of the Supreme Court of Mississippi. The Court stated (App. 107) that the "bill of lading" was stamped "Received by General Motors Corporation, Chevrolet Division, by Complete Auto Transit, Inc." Actually, the document on which the stamped notation was placed (Exhibit C-1-D, App. 19, 23-24) was not a bill of lading or shipping document; rather, it was a document which was transmitted from General Motors to Complete Auto in Jackson (App. 58, 86). Complete Auto did not execute any written acceptance at the time of taking possession of the automobiles from the railroad (App. 95-96).

Tax Commission first asserted that Complete Auto was subject to this privilege tax during the course of an audit of the three year period August 1, 1968 through July 31, 1971 (App. 37, 77-78). The tax imposed by Sections 10105 and 10109 (2) was in effect (at various rates) for the entire period from 1960 to 1968, but the State made no effort to apply the tax to Complete Auto for such period.

The assessment of the tax at issue here was based on the State Tax Commission's position that the continuation of the transportation of automobiles from Jackson to the dealer's locations in Mississippi was intrastate commerce. Indeed, as pointed out in its Brief in the Mississippi Supreme Court, this was the position of the State Tax Commission throughout the litigation.[4] The original pleading filed by Complete Auto in this cause alleged that its activities constituted interstate commerce (Bill of Complaint, App. 3). Thus, the case presented in the trial court largely centered on this question—whether the operations of Complete Auto consisting of transporting automobiles from Jackson to various dealers' locations in Mississippi constituted interstate or intrastate commerce.

Somewhat unexpectedly, however, the trial court held that the privilege tax statute was valid as applied to Complete Auto even though Complete Auto was engaged in exclusively interstate commerce, since all of the income upon which the tax could be imposed was derived from transportation within the State of Mississippi (see Opinion of the Chancery Court, App. 99). Thus, the constitutional question presented by this appeal formed the basis for the holding of the trial court.

The Mississippi Supreme Court affirmed the trial court, holding that a state can constitutionally impose a

4. See Brief of the Appellee filed in the Mississippi Supreme Court, at page 20.

privilege tax on the conduct of a purely interstate business, so long as the tax is non-discriminatory and is fairly apportioned to operations within the state (Opinion of the Mississippi Supreme Court, App. 106). Thus, the constitutional issue presented by this appeal was entertained by, and formed the basis of the decision of, the Supreme Court of Mississippi.

SUMMARY OF THE ARGUMENT

I. Complete Auto's activities in completing the interstate movement of the motor vehicles from the manufacturing plant to the designated dealers constituted interstate transportation. The vehicles in question were shipped from outside the state of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and in other states. The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect the interstate character of the transportation. The important fact is that the transportation was a continuous, pre-arranged movement from a point in one state to various pre-designated points in other states. Therefore, Complete Auto's operations were exclusively in interstate commerce.

II. It follows then that the privilege tax at issue in this case cannot be imposed on Complete Auto. This Court has uniformly held in numerous cases (*e.g., Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951)), that a state privilege tax is an impermissible direct burden on, and a forbidden regulation of, interstate commerce itself, since the privilege of doing interstate business is not subject to the sovereign power of the state. The constitutional infirmity of a privilege tax persists even if the tax is fairly apportioned and non-discriminatory.

III. The rule enunciated in *Spector* is supported by reason and principle and should be applied in this case. Taxes on interstate transportation should be subjected to careful scrutiny to insure that they do not burden interstate commerce, since strategically located states tend to exploit their geographical advantage by levying taxes on the transit of goods (as well as passengers and information) through the jurisdiction. While interstate commerce must pay its way, that does not justify the imposition of privilege taxes on interstate commerce, and particularly, on interstate transportation. Privilege taxes are more burdensome on interstate commerce than net income taxes, property taxes, or corporate franchise taxes, for two reasons. First, privilege taxes are traditionally directed at particular activities, such as transportation, rather than across-the-board at a large number of taxpayers. Second, privilege taxes on interstate transportation could be levied by numerous local taxing jurisdictions, while administration of the other taxes, with respect to interstate carriers, is most often conducted on a state-wide basis. The selectivity of a privilege tax makes it a vehicle by which a taxing jurisdiction may levy a tax that would be largely borne by non-residents, rather than by residents, of the taxing jurisdiction. Thus, privilege taxes, unlike taxes on broad classes of taxpayers, are not subject to local political restraints. The large number of local taxing jurisdictions levying privilege taxes is significant because of (a) the increased administrative burden on taxpayers engaged in interstate commerce created by diverse regulation and (b) the decreased likelihood that taxes actually burdening interstate commerce would be litigated.

This Court's decision that state and local taxing jurisdictions do not have the power to levy a privilege tax on purely interstate commerce was based, at least in part, on the reasoning that such taxation, if it is to be permitted at

all, requires the adoption of one uniform plan or system of regulation. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Congress has recognized the necessity for such a uniform system of regulation, thus providing additional evidence that the prior decisions of this Court were and are correct.

IV. Finally, a departure from the established rule that a state may not levy a privilege tax on interstate commerce would create a tremendous burden on Complete Auto. In economic effect, a gross receipts tax is imposed on the consumer of the services, and the "taxpayer" is merely serving as a tax-collecting authority for the state. The effect of the departure from *Spector* would be to retroactively impose on Complete Auto the duty of acting as tax collector for the state, and then to penalize Complete Auto for not having performed the duty which it did not know and could not know that it was required to perform. Thus, there should be no change in the long-established rule that state and local jurisdictions have no power to impose privilege taxes on exclusively interstate commerce unless such change is initiated by Congress.

ARGUMENT

I. Complete Auto Was Engaged Solely in Interstate Commerce.

As noted above, this tax assessment was originally founded on the Tax Commission's position that Complete Auto was engaged in the business of *intrastate* transportation. Thus, the issue presented to the trial court in this cause was whether the activities of Complete Auto constituted interstate or intrastate commerce. We believe that any fair and unstrained reading of the opinion of the Chan-

cery Court, as well as the opinion of the Mississippi Supreme Court, shows that this question has been resolved in favor of Complete Auto. Both courts based their opinions on the position that the state could tax interstate commerce, recognizing (either explicitly or implicitly) that the activities of Complete Auto were interstate in character. Since, however, the Appellee has suggested, in its Motion to Dismiss or Affirm, that the transportation activities involved in this cause were intrastate in nature, we shall comment briefly on the authorities and facts which support the conclusions of the courts below that the activities of Complete Auto constituted interstate commerce.

The operative facts in this case are not in dispute (Opinion of the Chancery Court, App. 99). It is uncontradicted that the vehicles in question were shipped from outside of the State of Mississippi and, from the inception of the movement, were consigned to specific dealers in Mississippi and in other states. The mere fact that there was a change in the *mode* of transportation (from rail to truck) does not affect or diminish the interstate character of the transportation. Nor does the fact that the portion of the movement *by truck* occurred wholly within Mississippi convert the interstate movement to intrastate transportation. Likewise, the fact that additional shipping documents were necessitated by the change in the mode of transportation is wholly irrelevant.[5]

The important fact is that the transportation was a continuous, pre-arranged movement from a point in one state to various pre-designated points in other states; as such, the essential character of the transportation was, and at all times remained, interstate commerce.

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5. Separate documents were prepared for the rail and truck portions of the movement because the carriers had not filed joint rates with the Interstate Commerce Commission (App. 69, 72-73).

The foregoing principles are abundantly supported by both reason and precedent.

Illustrative of the many decisions of the United States Supreme Court on this point is *Western Oil Refining Company* v. *Lipscomb*, 244 U.S. 346, 348-49 (1917) wherein this Court stated:

> Unlike Gulf, C. & S. F. R. Co. v. Texas, 204 U.S. 403, 51 L.Ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier which rightly conformed its action to what was said in the bill of lading. *On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated,* and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, *and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. . . .* (Emphasis added.)

Explicitly basing its holding on the decisions of this Court, the Mississippi Supreme Court has heretofore held that every part or link of a continuous passage from a point in one state to a point in another state is interstate commerce, even though a particular part of the carriage is

entirely within the limits of one state, and even though the carriers are separate and independent, with no joint traffic arrangement. *American Express Company* v. *Miller*, 104 Miss. 247, 249-250, 61 So. 306, 307 (1913). See also *United States* v. *Yellow Cab Company*, 332 U.S. 218, 228-229 (1946).

Likewise, the continuity and the interstate character of an interstate shipment are not affected by changes in, or by the form of, the bills of lading, or by changes in the method or means of transportation. *Minnesota* v. *Blasius*, 290 U.S. 1, 9-10 (1933).

Thus, the interstate character of this transportation is established by the following clearly proven facts: the intention of General Motors was to ship the motor vehicles from the place of manufacture in one state to various designated dealers located in other states; the only break in the shipment of the motor vehicles was for the purpose of loading the motor vehicles from the railroad cars to the trucks; and the transportation of the motor vehicles continued to the designated dealers.

Accordingly, it is clear that the Mississippi courts were correct in characterizing the transportation at issue as interstate commerce.

II. The Prior Decisions of This Court Hold That a State Cannot Levy a Privilege Tax on Interstate Commerce.

It is undisputed that the tax at issue in this case is a privilege tax on doing business. The statute clearly states that the tax is on the privilege of doing business; neither the statute nor the opinions of the courts below purports to place the tax on any "local incident" of Complete Auto's business. Moreover, the Tax Commission does not contend that Complete Auto engages in any activities in the State of Mississippi, other than the transportation activities at issue

here, which would subject it to payment of this Mississippi privilege tax. Finally, both courts below have concluded that the transportation activities of Complete Auto Transit, Inc. involved in this case constitute interstate commerce.

However, both the Chancery Court and the Mississippi Supreme Court determined that, notwithstanding the fact that the transportation constituted interstate commerce, Mississippi could levy a privilege tax thereon so long as no other state could duplicate the tax involved and thereby impose cumulative burdens. We contend that that conclusion is manifestly erroneous and in direct conflict with the prior decisions of this Court.

This Court has repeatedly held that a state cannot levy a tax on the *privilege* of engaging in exclusively interstate commerce, whether or not the tax is fairly apportioned to the activities conducted within a state.

Taxes imposed upon the privilege of carrying on interstate commerce, regardless of the amount of the tax, have uniformly been held obnoxious to the Commerce Clause on the ground that the privilege is given by the national, and not by the state, government. This Court has said that "No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce." *Atlantic and Pacific Tel. Co.* v. *Philadelphia*, 190 U.S. 160, 162 (1903). Similarly, "Any such excise burdens interstate commerce and is therefore invalid, without regard to measure or amount." *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, 217 (1925).[6]

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6. Since the privilege of engaging in interstate commerce is given by the national government, and not by the state government, a state-imposed privilege tax is an attempt to exact compensation without providing any benefit in return. This Court has consistently held that the "privilege" of engaging in interstate commerce cannot be granted or withheld by a state. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1958).

State taxes other than privilege taxes may be imposed on interstate commerce, provided they do not constitute an undue burden and are non-discriminatory. However, a state privilege tax is an impermissible direct burden on, and a forbidden regulation of, interstate commerce itself, since the privilege of doing interstate business is not "subject to the sovereign power of the state." *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 609 (1951). Therefore, the constitutional infirmity of a privilege tax persists even if the tax is non-discriminatory. *Id.* at 608-609.

Spector involved facts very similar to those presented in the case at bar. The issue in *Spector* was the validity of the Connecticut business tax which required corporations "carrying on business in this state" to "pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state," amounting to 2% of the net income attributable to business transactions within the state. Spector, a Missouri corporation with headquarters in Illinois, was engaged in the interstate transportation of freight by motor truck. For full truckload pick-ups and deliveries in Connecticut, Spector's over-the-road trucks went directly to the customer's place of business. Where less than truckload shipments were involved, pickup trucks operated by Spector gathered the freight from customers for assembly into full truckloads at either of two terminal facilities in Connecticut.

The *Spector* Court noted that the tax did not discriminate between interstate and intrastate commerce, nor did it place an unduly heavy burden on interstate commerce. Nevertheless, the Court held the tax invalid, reasoning that the power to levy a tax on the privilege of doing interstate business was vested exclusively in the federal government, and the states retained no power to subject interstate commerce to such a tax.

> In this field there is not only reason but long established precedent for keeping the federal privilege of carrying on exclusive interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—M'Culloch v. Maryland [17 U.S. (4 Wheat.) 316 (1819)].

340 U.S. at 610.

Spector was reaffirmed in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). *Northwestern* sustained the application of a state *net income tax* to revenues of a corporation engaged in interstate commerce, where the tax was properly apportioned to the local activities within the state. The Court specifically noted that *Northwestern* was not a privilege tax case, and then stated:

> It is also contended that *Spector* . . . requires a contrary result. But there it was repeatedly emphasized that the tax was "imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . ." Thus, it was invalid under a long line of precedents . . . . It was not a levy on net income but an excise or tax placed on the franchise of a foreign corporation engaged "exclusively" in interstate operations. . . . The taxes here, like that in West Publishing Co. v. McColgan . . ., are based only upon the net profits earned in the taxing State. That incidence of the tax affords a valid "constitutional channel" which the States have utilized to "make interstate commerce pay its way." In *Spector* the incidence was the privilege of doing business, and that avenue of approach had long been declared unavailable under the Commerce Clause.

358 U.S. at 463-64.

The rule enunciated in *Spector* was reiterated in *Railway Express, Inc.* v. *Virginia,* 347 U.S. 359 (1954) (*Railway Express I*) in which the Court invalidated a license tax imposed expressly "for the privilege of doing business in this state," 347 U.S. at 361 n.5. It was only after the Virginia statute was modified, so as to impose the tax on the taxpayer's property rather than on the privilege of doing business, that it was able to withstand constitutional attack. See *Railway Express, Inc.* v. *Virginia,* 358 U.S. 434 (1959) (*Railway Express II*).

The holdings of *Spector* and *Railway Express I* were recently concisely summarized in *Colonial Pipeline* v. *Traigle,* 421 U.S. 100, 112 (1975), where this Court stated:

> Spector held invalid under the Commerce Clause a Connecticut tax based expressly "upon [the corporation's] franchise for the privilege of carrying on or doing business within the state . . . ." Similarly, Railway Express I invalidated Virginia's "annual license tax" imposed on express companies expressly "for the privilege of doing business" in the State. Thus both taxes, as express imposts upon the privilege of carrying on an exclusively interstate business, contained the same fatal constitutional flaw. . . .

It is clear that the Mississippi statute at issue in this case contains the "same fatal constitutional flaw" that was found in *Spector* and in *Railway Express I.* Furthermore, it was only by repealing and eliminating this "unconstitutional basis" for the tax that Louisiana was able to enact a corporate franchise tax statute that would pass constitutional muster. The earlier Louisiana statute discussed in *Colonial Pipeline* had levied the tax "for the privilege of carrying on or doing business . . . in this state." 421 U.S. at 102. After the earlier statute was declared unconstitutional by a Louisiana court, the Louisiana Legislature

amended the statute there involved by providing for three "alternative incidents" on which the tax might be imposed, 421 U.S. at 103-04. It was the revised form of the statute that the Court upheld in *Colonial Pipeline.*[7]

Despite the fact that the taxing statute involved in this case is virtually identical to the earlier, unconstitutional Louisiana statute and to the statutes held invalid in *Spector* and *Railway Express I,* the Mississippi Supreme Court has held in the present case that the privilege tax upon a purely interstate business is valid "so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states." (App. 111). The Mississippi Supreme Court relied on the theory enunciated in the plurality opinion of *Interstate Oil Pipeline Co.* v. *Stone,* 337 U.S. 662 (1949). *Interstate Oil Pipeline,* however, predated *Spector.* The *Spector* opinion (written by Justice Burton, whose separate concurrence provided the 5-4 majority for the result in *Interstate Oil Pipeline*) clearly limited the plurality opinion in *Interstate Oil Pipeline* to its facts and repudiated its reasoning. See 340 U.S. at 609-610. Moreover, the theory adopted by the Mississippi Supreme Court in the present case (relying on the plurality opinion of *Interstate Oil Pipeline*) is exactly the same theory rejected by this Court in *Spector, Railway Express I,* and *Colonial Pipeline.*

It is unusual for a state appellate court to do as the Mississippi Supreme Court has done in steering a course so clearly prohibited by the decisions of this Court. There

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7. The opinion in *Colonial Pipeline* relied heavily on *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80 (1948). *Memphis Natural Gas* involved a Mississippi corporate franchise tax. We note that for all relevant years Complete Auto paid the Mississippi corporate franchise tax, as well as substantial Mississippi corporate income taxes, ad valorem taxes, and license plate fees. Exhibit C-5, App. 91, 92.

is not even a semblance of an attempt to reconcile the Mississippi decision with this Court's holdings. Rather, there is a naked assertion of the power to place a tax on the privilege of conducting a purely interstate business. We submit there is no basis on which the Mississippi Court's decision can be reconciled with the prior decisions of this Court in *Spector*, *Railway Express I*, or *Colonial Pipeline*, or with the principles on which those decisions were based.

III. The Rule Announced in the Prior Decisions of This Court Is Supported by Both Reason and Principle.

The foregoing discussion of the prior decisions of this Court makes clear that *Spector*, and the other cases cited, preclude imposition of this privilege tax on Complete Auto. That should end the argument. However, in the light of the questions as to the soundness of *Spector* raised by two Justices of this Court in the concurring opinion in *Colonial Pipeline, supra*, 421 U.S. at 113-16, we believe it appropriate to point out that Complete Auto's position is supported not only by precedent but also by reason and principle.

A. State and Local Privilege Taxes Would Unduly Burden Interstate Commerce.

The reference in *Spector* to *M'Culloch* v. *Maryland* makes it clear that *Spector* was based squarely on the proposition that certain subjects of taxation have been constitutionally excluded from the ambit of state taxing power because of the danger that the exercise of such taxing power by states, municipalities, and other local governmental entities would frustrate the basic constitutional premise that the United States is one integrated economic unit.

The Constitutional Convention was originally assembled in Philadelphia, following the Annapolis conference, in an effort to end the restrictions imposed on commerce by the various states' "retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity and selfishness could devise." See generally A. Beveridge, I The Life of John Marshall, 310-11 (1916).

The concept that the several states constitute one economic unit necessarily requires that the flow of trade among the states be subject to no unnecessary state-imposed impediments. Particularly, state taxes on transportation should be and must be subject to careful scrutiny to ensure that they impose no unnecessary burdens on interstate commerce. The potentially destructive nature of state taxes on the transportation of goods in interstate commerce has long been recognized. See, for example, the dicta of Chief Justice Marshall in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827), which clearly assumes the unconstitutionality of state taxes on the transit of goods through the state. See also Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219 (1957).

The danger, of course, is that strategically located states will exploit their geographical advantage by levying taxes on the passage of property through the jurisdiction.

> As Professor Brown points out:
> For these purposes it matters not whether the exaction is a tariff or a toll on the entrance of goods, or a tax on transportation. In fact, if a port area is involved, the tax on transportation may well lie more heavily upon consumers in the hinterland, who depend upon transit through and beyond the ports. The tariff or toll on entrance will fall upon the people of the port

areas as well as those beyond, and this may well exert a moderating influence in its imposition. But the tax on transportation falls only on those in remoter areas beyond the port and, accordingly, may tend to rise to the level of what the traffic will bear.

. . . As through traffic equals, exceeds or predominates over local in any jurisdiction—port, passage, city, county or state—a tax on transport, apportioned with whatever show of fairness one desires, can clearly be imposed at diminishing relative costs to the local taxpayers and voters. Outsiders with no voice in the determination of the tax will bear an increasingly large share of the burden. This is a cheap and domestically attractive way to finance a government, where opportunity offers. . . .

Brown, *supra*, 67 Yale L.J. at 229.

The holdings in *Spector, Railway Express I*, and *Colonial Pipeline* were not limited to privilege taxes levied on the business of engaging in interstate transportation, although each of the cases did involve interstate carriers. However, because of the tendency of strategically located taxing entities to enact a toll for passage through their territory, taxes imposed on the transportation of goods, passengers or information (communications) have historically presented the greatest danger to the free flow of trade. The particular scrutiny to be given taxes on interstate transportation was discussed in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433-34 (1947), where the Court stated:

> Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Thus, privilege taxes on interstate *transportation* are and should be subject to greater scrutiny than privilege taxes imposed on other activities.

Of course, it is far too late in the day to argue that this Court should invalidate all state taxes on interstate transportation and communications. All taxes are not destructive of free trade; interstate commerce must pay its way. States are entitled to compensation for the services they render to interstate commerce. While we do not quarrel with the proposition that interstate business should pay the costs of the government benefits it receives, we do contend that this proposition does not justify state and local imposition of *privilege* taxes on interstate commerce.

It is impossible to precisely compute and allocate the cost of providing state benefits to taxpayers engaged in interstate commerce. Certainly, the courts are not well-suited to make such economic determinations. Thus, the best way to achieve some degree of equity between cost and benefit is to require that non-residents be afforded equal treatment with residents of the taxing jurisdiction. In the absence of national restraints imposed by Congress

or by the courts, the only possible restrictions on local abuse of the taxing power are local political checks imposed by the residents of the taxing jurisdiction. For the reasons discussed below, however, privilege taxes upon interstate transportation and communications are not subjected to political restraints imposed by local voters. Thus, we submit that *privilege* taxes upon the transportation of goods (and passengers, as well as the transportation of information) in interstate commerce present far greater problems than those taxes which the Court has previously upheld.

For example, the Court in *Northwestern Portland Cement Company, supra,* upheld a net income tax on interstate commerce. Presumably, *Northwestern* is fully applicable to a taxpayer engaged in the transportation of goods in interstate commerce, as well as to sales of goods. However, there are sound constitutional reasons for sustaining a net income tax (as in *Northwestern*) while prohibiting the imposition of a state or local privilege tax (as in *Spector* and *Railway Express I*).

First, with few exceptions, net income taxes are generally levied by states, rather than by counties or municipalities or other local taxing authorities; thus the diversity of local taxation does not pose as great an administrative burden on taxpayers. Moreover, the smaller number of taxing jurisdictions, and the greater amount of taxes each would levy, makes it more likely that taxes which discriminate against interstate commerce will in fact be litigated, rather than paid by the carriers.

Second, net income taxes are generally applicable across-the-board to taxpayers engaged in all occupations, rather than directed just at transportation or at other aspects of interstate commerce. On the other hand, privilege taxes are often directed at particular activities, such

as transportation and communications.[8] Thus, because of its selectivity, there is a greater opportunity and probability that a privilege tax would be manipulated to the advantage of local residents and to the disadvantage of interstate carriers, shippers and non-resident consumers.[9]

Likewise, fairly apportioned ad valorem taxes on property used in or moving in interstate commerce do not present the same dangers as a privilege tax. Property taxes are by their nature assessed on a broad class of property, rather than only on property used in interstate commerce, thus diminishing the likelihood that such a tax will materially act to the advantage of local residents at the expense of non-residents. Moreover, property taxes on moving equipment of interstate carriers, and on the property of utility and communications taxpayers, are often assessed pursuant to a uniform statewide system, rather

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8. See the numerous exceptions and exemptions to the Mississippi sales tax statute involved in this case, Sections 27-65-1 through -29, Mississippi Code of 1972, Annotated, Vol. 9, pages 4-38 (formerly codified as Sections 10103 *et seq.*, Mississippi Code of 1942). For example, Section 27-65-29 (d)(1) (prior to amendment by Mississippi Laws 1972, Chapter 506, note 1 *supra*) exempted from the tax any amounts received for the intrastate transportation of commercial fertilizers, asphaltic or Portland cement, wood chips, chlorine, seafoods, natural resources and products of the forest, farm, grove or garden in the original condition or state of preparation for sale.

In addition, the Mississippi state and local privilege taxes occupy 191 *pages* of one volume of the Code, and include, among others, diverse special privilege taxes for those doing business as telephone and telegraph companies, railroad companies, sleeping car companies, express companies, pipeline companies, transient vendors or dealers, cotton buyers, horse and mule auctioneers (separate rates for residents and non-residents) and Gypsies. See generally Sections 27-15-1 through -251 and 27-17-1 through -521, Mississippi Code of 1972, Annotated, Vol. 7, pages 502-693 (formerly codified as Section 9427 *et seq.*, Mississippi Code of 1942).

9. Cf. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 34, 45 n.2 (1940).

than separately by each taxing jurisdiction in the state.[10] Thus, for the reasons set out in the preceding paragraphs—application to a broad class of taxpayers, and administration by a limited number of taxing jurisdictions—property taxes are less likely to burden interstate commerce than are privilege taxes. And similarly, for these same reasons, corporate franchise taxes are less likely to burden interstate commerce than privilege taxes on doing business.

Further, in the absence of a clear rule as to the validity *vel non* of a state's or local municipality's privilege tax levied on a taxpayer engaged in interstate commerce, a carrier would be required to prove that the tax either discriminated against or unduly burdened interstate commerce. This would not be a light burden for a carrier to undertake; nor are the standards to govern judicial scrutiny of such taxes susceptible to easy application by the courts. Often expediency would require that a carrier acquiesce in the unconstitutional tax provisions of the multiple jurisdictions through which it passes rather than pursue its expensive, time-consuming, and uncertain remedies in the courts.

Thus, there is much more to the distinction between net income taxes and privilege taxes (however measured) than a "mere matter of form." Rather, *Spector* and *Northwestern* together recognize that, although in some instances the two taxes *may have* similar economic impact, that similarity of economic effect is not inevitable. Given the propensity of geographically advantaged jurisdictions to favor

10. See, for example, the procedure used in *Braniff Airways* v. *Nebraska Board of Equalization*, 347 U.S. 590 (1954). Mississippi has similar statewide assessment procedures for many utilities and carriers. See generally Section 27-35-301 through -711, Mississippi Code of 1972, Annotated, Vol. 8, pages 380-403 (formerly codified as Sections 9825 *et seq.*, 9837 *et seq.*, and 9853-01 *et seq.*, Mississippi Code of 1942).

local interests at the cost of interstate transportation, such similarity of effect is not even probable. Instead, a privilege tax gives states, as well as cities and counties, a vehicle to levy a tax that will be borne to a much greater extent by non-residents than by residents. Thus, since local political considerations may not act as an effective restraint on privilege taxes burdening interstate commerce, and since Congress has relied upon existing jurisprudence and thus has not enacted any legislation to restrain such locally-imposed privilege tax burdens, this Court should not sanction the imposition of state and local privilege taxes on interstate commerce.

B. Congress Has Recognized and Relied Upon the Rule That a State May Not Tax the Privilege of Engaging in Interstate Commerce.

In 1959, this Court decided *Northwestern States Portland Cement Company* v. *Minnesota*, *supra*, which upheld the imposition of a net income tax on a company engaged in exclusively interstate commerce. As described in H.R. Rep. No. 2013, 89th Cong., 2d Sess. 2-3 (1966), Congressional reaction to *Northwestern* was prompt. Within weeks of the decision, the Senate Select Committee on Small Business began a series of public hearings. The hearings were followed by reports to the Senate urging (1) the enactment of a federal statute establishing a minimum standard restricting the imposition of state income taxes on interstate commerce and (2) the creation of a study commission to formulate proposals for uniform standards governing such taxes. As a result, Congress enacted Public Law 86-272, 73 Stat. 555 (1959).[11]

11. The full text of the Law is set out at Appendix B to this Brief.

Originally, both the minimum jurisdictional standard established by Public Law 86-272 and the study which the Law authorized were concerned only with state net income taxes. However, after this Court's decision in *Scripto, Inc.* v. *Carson*, 360 U.S. 207 (1960) (a use tax case), Congress enacted Public Law 87-17, 75 Stat. 41 (1961).[12] That statute broadened the scope of the study required by Public Law 86-272 so as to include "all matters pertaining to taxation of interstate commerce by the states . . . or any political or taxing subdivision. . . ."

As described in H.R. Rep. No. 1480, 88th Cong., 2d Sess. 9 (1964):

> Thus, in the year and a half between the decision in *Northwestern* and the broadening of the study which followed *Scripto*, Congress had for the first time exercised its power under the commerce clause to affect State taxation of multistate businesses, and in doing so had committed itself to assuming at least some portion of the responsibility which had hitherto been borne exclusively by the courts.

H.R. Rep. No. 1480 discusses specifically the inadequacy of the judicial process to resolve the problems of multistate taxation of interstate commerce, and alludes to the opinions of a number of the Justices of this Court who subscribed to the view that Congress was the most appropriate branch to deal with such problems.[13] Justice Frankfurter's views are typical of those discussed:

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12. The full text of the Law is set out at Appendix C to this Brief.

13. The Report attributes this view to Justices Jackson, Rutledge, Black, Frankfurter, Douglas, and Clark. H. Rep. No. 1480, *supra*, at 19.

> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency.

Northwestern, supra, 358 U.S. at 476-77 (dissenting opinion).

Accordingly, it is clear that Congress, through passage of Public Law 86-272, as amended by Public Law 87-17, has recognized the need for uniform standards in this area

and has undertaken a comprehensive study of all matters pertaining to the taxation of income derived from interstate commerce, and privilege taxes generally.[14]

The results of that study are contained in four volumes: H.R. Rep. 1480, 88th Cong., 2d Sess., 2 vols. (1964); H.R. Rep. 565, 89th Cong., 1st Sess. (1965); H.R. Rep. 952, 89th Cong., 1st Sess. (1965). The study, and the proposed legislation based thereon, are summarized in H.R. Rep. No. 2013, 89th Cong., 2d Sess. (1966).

Additional hearings were held on proposed legislation in 1966,[15] and in 1973.[16] The House passed Bills dealing with the subject in 1968,[17] and in 1969;[18] both proposals, however, died in the Senate. Congressional study has continued, and S.B. 2080, 94th Cong., 1st Sess. (1975) (introduced but not adopted during the last Congress) is one of several recent Congressional attempts to begin to create a system that reconciles the states' need for revenue with the federal interest in unimpeded interstate commerce.

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14. While the study as prepared, as well as most of the subsequently proposed legislation, was directed specifically at the problems of companies marketing goods in more than one state, and not primarily at the transportation industry, H.R. Rep. No. 2013, *supra*, at 4, indicates that data collected substantiated the need for further evaluation of problem areas not covered by the proposed legislation, such as transportation. See also H.R. Rep. No. 952, *supra*, at 1138, which recommends that the Secretary of the Treasury determine if there is a need for legislation with respect to the interstate problems of companies engaged in transportation and other specified businesses.

15. Hearings on H.R. 11798 Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 89th Cong., 2d Sess. (1966).

16. Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Finance Comm., 93d Cong., 1st Sess. (1973).

17. H.R. Rep. 2158, 90th Cong., 2d Sess. (1968), see 114 Cong. Rec. 14,432-33 (1968).

18. H.R. Rep. 7906, 91st Cong., 1st Sess. (1969), see 115 Cong. Rec. 17,323 (1969).

In the light of the expressed Congressional intention that these complicated matters may best be resolved by federal legislation, this Court should not allow the State of Mississippi to interfere with the well-established and long-existing precedents upon which the Congressional study is based. Congress has taken cognizance of the existing pattern of state taxation of interstate transportation, including the limitation on state power imposed by the principle recognized in *Spector*. It is clear that Congress finds the existing accommodation of competing state and federal interests acceptable, pending a full and complete resolution of the questions surrounding state taxation of interstate commerce by Congress.

The principle that the states are without power to withhold or tax the privilege of engaging in interstate commerce is based at least in part on the principle that such taxation, if it is to be permitted at all, requires the adoption of one uniform (and thus federally-sanctioned) plan or system of regulation. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The discriminations and uncertainties that would arise from multitudinous and diverse privilege taxes levied by states, counties, cities, towns, districts, and villages throughout the country would undoubtedly burden interstate commerce. Public Law 86-272 was no doubt enacted with the intent of avoiding multiple and conflicting state regulations. Viewed in that context, the adoption of Public Law 86-272 strongly suggests that the states and local governments should not be allowed to expand their historic taxing jurisdiction so as to place privilege taxes on interstate carriers without congressional consent and regulation. It is clear that Congress viewed Public Law 86-272 as a stop-gap measure, pending more complete congressional legislation.[19] Accordingly, preservation of the *status quo* as to

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19. See H.R. Rep. No. 2013, *supra*, at 8.

the privilege tax issue is clearly consistent with and carries out the general purpose of the federal statutes.

The holding of this Court in *Spector* that the states have no power to levy privilege taxes on interstate commerce was enunciated long before Congress (through Public Laws 86-272 and 87-17) legislatively recognized the need for federal guidelines and standards to govern the exercise of state power over interstate commerce. That Congress has now made such a determination is additional evidence that the Court's prior decisions were and remain correct.

Indeed, in view of the firmly-established principle that a state has no power whatsoever to levy a privilege tax on interstate commerce, and Congress' long acceptance thereof, this Court might well conclude that the states, if they ever had such power, are now preempted from exercising it unless Congress authorizes them to do so. Of course, a decision under the preemption doctrine would necessarily involve consideration of many of the same interests which originally prompted this Court to declare that the states had no power in this area whatsoever. As one commentator has noted,

> [W]hen the question is one of the negative implications of some affirmative constitutional grant of power, such as that over commerce, the view Congress takes of the permissible limits of state action is a proper concern to the court.

Note, *Preemption As a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208, 225 (1959).

In sum, Congressional recognition of the necessity for uniform standards in this area supports the prior decisions of this Court which have held that states have no power to levy privilege taxes on interstate commerce.

IV. Complete Auto Would Be Severely Prejudiced by a Retroactive Imposition of Taxes.

A decision by this Court that states now have (and have had) the power to impose a privilege tax on carriers in exclusively interstate commerce would seriously prejudice Complete Auto. The imposition of such taxes could not have been anticipated by Complete Auto, in view of the rule enunciated by this Court in *Spector* and reiterated by this Court as recently as 1975 in *Colonial Pipeline*. Thus, Complete Auto has had no opportunity or occasion to pass the tax on to the consumer, usually the ultimate bearer of a gross receipts tax. Moreover, it should be noted that the tax involved in this case is a tax on gross income—a tax which bears no relationship to net income or net profits, and which, if not passed on to the consumer in one form or the other, might well in many cases exceed the net profit from the operations. Had Complete Auto known that it was constitutionally subject to a privilege tax of the type at issue here, it would no doubt have collected it from General Motors (App. 89). Indeed, Section 10117, Mississippi Code of 1942 (now codified as Section 27-65-31, Mississippi Code of 1972, Annotated, Vol. 9, pages 39-40)[20] required the persons liable for the tax to add the amount of the tax to the gross charge for the services and to collect that amount from the purchasers of the services. In economic effect, the tax is imposed on the consumer of the services, and the "taxpayer" is merely serving as a tax-collecting authority for the state. Thus, the effect of a decision by this Court to depart from its holding in *Spector* would be to retroactively impose on Complete Auto the duty of acting as tax collector for the state, and then to penalize the carrier for not having performed the duty which it

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20. The full text of the Section is set out at Appendix D to this Brief.

did not know it was required to perform. While there may be theoretical distinctions between an *ex post facto* legislative enactment and a judicial decision which changes existing constitutional standards, the two procedures would have the same practical effect in this case—a retroactive change in the tax-collecting responsibilities of interstate carriers.

H.R. Rep. No. 565, *supra*, at 636-637 discusses the various unpalatable alternatives facing a taxpayer who is uncertain as to whether he is required to collect a sales tax. The House Report points out that if the taxpayer does not collect the required taxes from his customers the result is often

> that the seller may have to pay the tax out of his own pocket and thus incur what is in effect a 100% penalty. For unlike the case of income tax delinquency and unlike the case where the buyer is required to remit a tax on his own past purchases, the delinquent seller-collector is required to assume a liability which was not his to begin with.

H.R. Rep. No. 565, *supra*, at 637.

On the other hand, the House Report also points out the near impossibility of collecting such a tax if the taxpayer's competitors are not collecting it from their customers. Certainly, that is the case here, when the entire industry was relying on *Spector* and *Railway Express I*. The State Tax Commission had made no effort to apply the privilege tax statute to Complete Auto prior to the commencement of the audit giving rise to this assessment. Moreover, this assessment was originally based on the Tax Commission's position that Complete Auto was engaged in intrastate commerce. Indeed, the record in this case shows that the State Tax Commission has only come

belatedly, and alternatively, to its contention that it has the power to levy this tax *even though* Complete Auto's activities were interstate transportation.

Unless the decision of the court below is reversed, each state with a privilege tax applicable to transportation could contend that every interstate carrier is (and has been) subject to the tax. The tax burden could be enormous, and its effect would be all the more overwhelming since it could be imposed retroactively to the extent permitted by the applicable statute of limitations. Moreover, if under state law the statute of limitations did not start running until the filing of a return, the tax might be imposed retroactively for an indeterminate period, since undoubtedly many interstate carriers, in reliance on this Court's holding in *Spector*, have not filed the required tax returns.

Since in many instances it will be impossible or impracticable to collect taxes from customers for prior years, the cost of the taxes assessed would be borne by the carriers or by their current customers. That cost would place a substantial burden on interstate commerce generally, since the tax would affect the carriers' operations and their customers system-wide, not only in taxing states but in other states as well.

For the reasons hereinabove stated, Complete Auto, and most other interstate carriers, are opposed to state and local privilege taxes. Complete Auto's opposition to the State Tax Commission's attempt to collect this tax, however, is not based solely on a reluctance to pay such taxes *in the future*. Rather, Complete Auto is also opposed to a retroactively effective repudiation of the constitutional principles on which it has relied in paying its taxes. The State of Mississippi's attempt, at this late date, to assert authority to levy a privilege tax on interstate commerce violates the

principles of fair play and reasonable notice, as well as the general notion of due process.

The hardship that would result from a judicial alteration of the existing constitutional standards, however, would not necessarily result from Congressional action permitting such taxes. If such taxes are to be permitted at all, Congressional action applied prospectively could provide for an orderly transition to the uniform jurisdictional standards thus legislatively established, and would prevent a haphazard flurry of assessments for back liability.[21]

Thus, for this additional reason, as well as the reasons enunciated above, this Court should defer to Congressional iniatives, rather than abandoning the principle enunciated in *Spector*, *Railway Express I*, and *Colonial Pipeline*.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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21. For example, Section 525 of the proposed Interstate Taxation Act, as described in H.R. Rep. No. 2013, 89th Cong., 2d Sess. 9 (1966) provides for an orderly transition to a federally-sanctioned uniform system of state taxation of interstate commerce. See also Section 354 of S.B. 2080, 94th Cong., 1st Sess. (1975).

APPENDIX A

Section 27-65-19, Mississippi Code of 1972, Annotated (recodification of Section 10109, Mississippi Code of 1942)

§ 27-65-19. Public utilities.

(1) Upon every person selling to consumers, electricity, current, power, portable water, steam, coal, natural gas, liquefied petroleum gas or other fuel, there is thereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of the business. Provided, however, that there is hereby levied, assessed and shall be collected a tax equal to one per cent of the gross income of the business when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel, is sold to or used by a manufacturer, custom processor or public service company for industrial purposes which shall include that used to generate electricity, to operate an electrical distribution or transmission system, to operate pipeline compressor or pumping stations or to operate railroad locomotives.

The one per cent industrial rate provided herein shall also apply when the electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel is sold to a producer or processor for use directly in the production of poultry or poultry products, the processing of milk and milk products, the processing of poultry and livestock feed, and the irrigation of farm crops.

This one per cent rate shall not apply to sales of fuel for automobiles, trucks, truck-tractors, busses, farm tractors or airplanes.

Upon every person operating a telegraph or telephone business for the transmission of messages or conversation between points within this state, there is hereby levied, assessed and shall be collected, a tax equal to five per cent of the gross income of such business, with no deduction or allowance for any part of an intrastate rate charge because of routing across a state line.

(2) Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business, except persons operating local transit busses shall be exempt from such tax; and upon persons operating taxicabs within municipalities and within four miles thereof, there shall be collected a tax equal to two per cent of the gross income of the business.

"Gross income" shall mean and include the gross receipts derived from the operation of a taxi terminal or cab operating company to include the gross receipts or charges of each and all vehicles operating from or through said central terminal.

APPENDIX B

Public Law 86-272

AN ACT

Relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—IMPOSITION OF MINIMUM STANDARD

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate

commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed—

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If ny provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

TITLE II—STUDY AND REPORT BY CONGRESSIONAL COMMITTEES

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommend-

ing to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 202. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.

Approved September 14, 1959.

[Public Law 86-272 was subsequently amended by Public Law 87-17 (set out in Appendix C to this Brief) and by Public Law 87-435, 76 Stat. 55 (1962); Public Law 88-42, 77 Stat. 67 (1963); and Public Law 88-286, 78 Stat. 166 (1964) (all of which extended the date for the report required by Section 202).]

APPENDIX C

Public Law 87-17

AN ACT

To amend Public Law 86-272 relating to State taxation of interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 201 of Public Law 86-272 (73 Stat. 556) is amended to read as follows:

"Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation of interstate commerce by the States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, or any political or taxing subdivision of the foregoing."

Approved April 7, 1961.

APPENDIX D

Section 27-65-31, Mississippi Code of 1972, Annotated (recodification of Section 10117, Mississippi Code of 1942)

§ 27-65-31. Seller to collect tax.

Any person liable for a privilege tax levied and assessed by sections 27-65-17, 27-65-19, 27-65-23 and 27-65-25 of Mississippi Code of 1972, shall add the amount of such tax due by him to the sales price or gross income, and, in addition thereto, shall collect, insofar as practicable, the amount of the tax due by him from the purchaser at the time the sales price or gross income is collected. However, the provisions of this section shall not apply to charges for communication services taxable under section 27-65-19, the rates for which were on January 1, 1952, subject to the jurisdiction of the Mississippi public service commission, except to the extent the rates of tax imposed were not included as a part of the cost of furnishing services in fixing rates and charges.

The commissioner is hereby authorized, in his discretion, to prescribe by rule or regulation, brackets or schedules by which the applicable tax shall be collected from the purchaser.

It shall be unlawful for any person, who is liable for a privilege tax levied by sections 27-65-17, 27-65-19, 27-65-23 or 27-65-25 of the Mississippi Code of 1972, to fail or refuse to add to the sales price and collect, insofar as practicable, the amount of tax due by him on each sale, except where the tax was included in the cost of furnishing service when said cost was a factor in the fixing of rates and charges.

The tax due under the provisions of this chapter, shall be computed and paid on gross income or gross proceeds of sales of the business, regardless of the fact that small unit sales may be within the bracket of one of the schedules which does not provide for the collection of the tax from the customer.

Nothing in this section with reference to the collection of the tax from the customer shall be construed to impair, abridge, alter, or affect the obligation of any contract in existence at the time it becomes effective.

When the tax collected for any filing period is in excess of the amount due, the total tax collected, including that in excess of the computed liability, shall be paid to the commissioner. This provision shall be construed with other provisions of the law and given effect so as to result in the payment to the commissioner of the total tax collected if in excess of the amount due when computed at the applicable rates.

Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars.